

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal
of:

**ECHO ALPHA, INC., JOHN STAGLIANO,
INC.; EVIL ANGEL PRODUCTIONS, AND
JOHN STAGILANO, INC. DBA EVIL
ANGEL VIDEO**

14141 Covello Street, Unit 8C
Van Nuys, California 91405

Employer

DOCKETS 14-R3D1-0802
through 0804

DECISION

Statement of the Case

Echo Alpha, Inc., John Stagliano, Inc., Evil Angel Productions, and John Stagliano, Inc. dba Evil Angel Video (Employer¹) is a video distributor. Beginning August 20, 2013, the Division of Occupational Safety and Health (the Division) through then-Associate Safety Engineer Brandon D. Hart², and Associate Safety Engineer Kim Knudsen conducted a complaint inspection at a place of employment maintained by Employer at 14141 Covello Street, Unit 8C Van Nuys, California (the site). On February 19, 2014, the Division issued Employer three citations. All citations were settled except for Citation 2. The Division withdrew instance 1 of Citation 2. Citation 2, instance 2 remained at issue, a serious violation of § 3203(a) for failure to correct unsafe work conditions.

A hearing was held at West Covina on January 28, 2015 before Administrative Law Judge (ALJ) Dale A. Raymond³. Karen Tynan, Attorney,

¹ Effective January 1, 2014, John Stagliano, Inc. reorganized into two corporations: Echo Alpha, Inc., and ZoZo Productions. Evil Angel Productions was wholly owned by John Stagliano, but never conducted any business.

² Brandon D. Hart has since been promoted to Senior Safety Engineer.

³ This matter originally came for hearing before Sandra L. Hitt, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board at West Covina, California, on July 22, 2014. The hearing was not concluded. Judge Hitt subsequently resigned from the Appeals Board and was unable to conclude the hearing. Pursuant to Board

represented Employer. Kathryn Woods, Staff Counsel, and Melissa Peters, Staff Counsel, represented the Division. The parties presented oral and documentary evidence. The matter was submitted on January 28, 2015. The ALJ extended the submission date to February 27, 2015.

Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

Issues

1. Did Employer enforce safety and health practices and ensure employees followed safe work practices, directives, policies and procedures for maintaining a safe work environment as required by their Illness and Injury Prevention Program (IIPP)?
2. Was the violation properly classified as serious?
3. Was the proposed penalty reasonable?

Findings of Fact

1. Employer's written IIPP included systems for ensuring that employees complied with safe and healthy work practices. The IIPP provided for recognizing employees who performed safe and healthful work practices, acknowledging safety accomplishments, training for employees whose safety performance was deficient, progressively disciplining failure to comply with safe and healthful work practices, evaluating the safety performance of all employees, and informing all employees of the provision of Employer's IIPP.
2. Employer did not ensure that employees followed safe work practices, directives, policies, and procedures. Employer did not recognize employees who followed safe work practices, have training and retraining programs, disciplinary actions, or any other means that ensured employee compliance with safe and healthful work practices.
3. Serious physical harm as a result of the actual hazards created by Employer's failure to ensure employees complied with safe and healthy work practices was a realistic possibility.
4. The proposed penalty is reasonable, except for the rating for Extent.

Analysis

- 1. Did Employer enforce safety and health practices fairly and uniformly and ensure employees followed safe work practices, directives, policies, and procedures for maintaining a safe work environment?**

Regulation 375.1(c), the proceeding was transferred to ALJ Dale A. Raymond, who held a hearing *de novo*.

Section 3203(a) requires employers to establish, implement, and maintain an effective written IIPP that includes all required elements. Section 3203(a)(2) requires employers to:

Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

The four possible means of substantial compliance identified in § 3203(a)(2) are written in the disjunctive: (1) recognition of employees who follow safe and healthful work practices, (2) training and retraining programs, (3) disciplinary actions, and (4) any other means that ensures employee compliance with safe and healthful work practices. The Division has the burden of proof to show that Employer did not effectively implement any of the alternatives. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 31, 2013) p. 9 citing *Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013) p. 8, citing *E.L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007); *Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999)[when safety order written in disjunctive, Division has burden to prove that employer did not comply with any of the listed alternatives].)

The alleged violation description (AVD) reads as follows:

The employer failed to implement and maintain all the required elements of their Injury and Illness Prevention Program including, but not limited to correcting unsafe work condition(s) and/or work practices, which are essential to their overall program.

Instance 2

The employer failed to enforce the safety and health practices fairly and uniformly and failed to ensure employees used safe work practices, and followed directives, policies and procedures to maintain a safe

work environment, as required by their written program.

The site was primarily a warehouse where Employer stored product and materials. On August 20, 2013, General Manager of Operations Christian Mann (Mann) gave Associate Safety Engineer Brandon Hart (Hart) a tour of the facility.

Employer had four alternatives to ensure employees complied with safe and healthy work practices: (1) recognition of employees who follow safe and healthful work practices, (2) training and retraining programs, (3) disciplinary actions, or (4) any other such means that ensures employee compliance with safe and healthful work practices. Employer's IIPP (Exhibit 5) provided that the "other means" included "Informing workers of provisions of our IIPP Program; Evaluating the safety performance of all workers; Recognizing superintendents who perform safe and healthful work practices; Providing training to workers whose safety performance is deficient; Disciplining workers for failure to comply with safe and healthful work practices; Terminating any employee who receives more than two written warnings."

Recognition of Employees

The record was void of any evidence that Employer ever recognized employees who followed safe and healthy work practices. There was no evidence that any employee ever received any written acknowledgement of contribution to safety, as allowed by the IIPP. John Stagliano (Stagliano), Owner and President, testified that employees received recognition in the form of a smile.

Training and Retraining Programs

Employees were trained when hired, and given an employee handbook. (Exhibit 6) Safety training consisted of general instructions prohibiting open toed shoes in the warehouse, prohibiting violence, requiring locked doors, requiring work areas to be maintained in an orderly fashion; prohibiting electrical outlets from being overloaded, requiring all accidents to be reported, and requiring employees to immediately notify a supervisor if there is any situation that the employee feels is unsafe. The safety training did not cover any of the violations for which Hart cited Employer in this case.

Stagliano testified that Employer did not always train new employees. Stagliano was not aware of any safety meetings that took place at the warehouse. No employee was ever retrained because, according to Stagliano, the tasks were not so complicated that retraining was required. There were no training or inspection records. Stagliano thought that safety was a matter of common sense.

Disciplinary Actions

The only evidence of discipline for a safety infraction was Chief Financial Officer and Corporate Secretary Adam Grayson's testimony that the rule prohibiting open toed shoes in the warehouse was enforced. Enforcement consisted of not allowing the employee to go in the warehouse. Employer did not have any evidence that any employee ever had been disciplined for any other safety infraction. It cannot be found that Employer implemented its progressive disciplinary system.

Other Means

Employer's IIPP identified "other means" to ensure employee compliance with safe and healthful work practices to include (1) informing employees of their IIPP program; (2) evaluating the safety performance of all employees; (3) recognizing superintendents who perform safe and healthful work practices; (4) providing training to workers whose safety performance is deficient; (5) disciplining workers for failure to comply with safe and healthful work practices; and (6) terminating any employee who receives more than two written warnings.

Stagliano was not involved in informing employees about Employer's IIPP. Hart credibly testified that employees were not aware of Employer's IIPP or trained on what was required. An evaluation of the safety performance of all employees was never done. As discussed, there was no evidence that Employer ever recognized superintendents for performing safe and healthful work practices, provided employee training, or disciplined employees. There was no evidence that Employer ever gave an employee a written warning for a safety violation or terminated an employee for a safety violation.

Based on the above, it is found that the Division carried its burden of proof to establish that Employer failed to implement and maintain all the required elements of its Injury and Illness Prevention Program including, but not limited to, correcting unsafe work conditions and work practices. It is further found that Employer failed to enforce its safety and health practices, and failed to ensure employees followed safe work practices, directives, policies and procedures to maintain a safe work environment.⁴ Employer established, but did not implement or maintain its IIPP.

Therefore, the Division established a violation of § 3203(a)(2).

2. Was the violation properly classified as serious?

⁴ As Employer did not implement its IIPP, it follows that it did not maintain its IIPP.

Labor Code section 6432 (a) provides:

There shall be a rebuttable presumption that a ‘serious violation’ exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

The legal standard “realistic possibility” is not defined in the safety orders. The Appeals Board utilized a “reasonable possibility” standard in *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980) when analyzing whether an employer must ensure workers possibly exposed to the danger of splashing caustic chemicals were required to wear eye protection. The Appeals Board determined that it is unnecessary for DOSH to “present actual proof of hazardous splashing if a realistic possibility of splashing exists.” They explained, “Conjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) the existence of unsafe working conditions if such a prediction is clearly within the bounds of human reason, not pure speculation.” This definition was again used in *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001). Presumably, the Legislature was aware of the Appeals Board’s interpretation of “realistic possibility,” and by adopting that language, approved the Board’s definition when it amended Labor Code §6432(a), effective January 1, 2011 to include that language. (See *Moore v. California State Board of Accountancy* (1992) 2 Cal. 4th 999, 1017, 9 Cal. Rptr. 2d 358, 831 P. 2d 798.)

The purpose of safe and healthy practices is to avoid injuries, illnesses, and death. The hazard created by Employer’s failure to enforce its safety and health practices and failure to implement a system for ensuring employee compliance is that employees would not comply. As a result, employees were exposed to job site hazards.

Job site hazards included electrocution, fire, explosion, and falls onto concrete of about nine feet. Hart’s opinion⁵ was that an employee would likely

⁵ Hart’s opinion was based on his education and experience. He was current in his required Division training. Hart had investigated accidents that resulted in electrocutions from exposure to contact with live electrical cords and cables. Warehouse fires are often attributed to faulty electrical wiring. In this case, a flexible cord was strung against combustible wood, which could cause a warehouse fire. The circuit breakers were 20, 30 and 40 amps, which was significant enough to stop a human heart, depending on the path to ground. One amp will kill instantly. Openings in an electrical panel created the hazard of an arc flash. Any type of arc flash of a low voltage electrical panel creates a heat intensity that is equivalent to the sun. It splashes hot molten copper on to anyone nearby; it vaporizes immediately and causes second and third degree burns. Blocked fire extinguishers pose the risk of employees getting burned by fire because they cannot get to the fire extinguisher fast enough. The unpermitted air tank created the hazard of tubing that could explode.

suffer serious physical harm from an accident caused by the job site hazards, such as fractured bones, burns, electrocution, and even death. Employer did not present evidence to rebut Hart's opinions, although it was within Employer's power⁶. Thus, it is inferred that Hart's opinions are correct.

Therefore, it is found by a preponderance of the evidence that a realistic possibility of serious physical harm or death existed from the actual hazards caused by the violation.

Accordingly, the violation was properly classified as serious.

3. Was the proposed penalty calculated appropriately and reasonably?

Penalties proposed by the Division in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations pursuant to legislative mandate (§§ 333-336) are presumptively reasonable and will not be reduced absent evidence by Employer that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Division's Proposed Penalty Worksheet (Exhibit 8) shows calculation of the proposed penalty. Severity was \$18,000, as required for all serious violations. (§ 336(c)(1)) Hart rated Extent and Likelihood as medium, yielding a gravity-based penalty of \$18,000. Hart rated Extent as medium because he believed that three⁷ of the seven required IIPP elements were out of compliance, but he thought that Extent should be raised to high because four⁸ of the elements were out of compliance. He rated Likelihood as medium by comparing the site to other working warehouses. Although Employer has not had any recent injuries, there was a fair degree of likelihood of an injury due to the number of hazards. Hart applied penalty adjustment factors of 0% for good faith, 20% for size, and 10% for history. The 20% factor for size was based on 40 employees. (§ 336(d)(1)) The maximum adjustment (10%) was given for history because Employer did not have any history of serious, willful

⁶ The Appeals Board may consider an employer's failure to explain or deny by its own testimony adverse evidence or facts. Evidence Code 413 provides that "In determining what inferences to draw from the evidence of facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence of facts in the case against him." (*Kaiser Steel Corporation*, OSHAB 75-1135, Decision After Reconsideration (June 21, 1982).) The court in *Shehtanian v. Kenny* (1958) 156 Cal.App.2d 576, ruled that a defendant's failure to offer any evidence on a certain issue, though production of such evidence was clearly within the defendant's power, raised an inference that the evidence, if produced, would have been adverse.

⁷ (a)(4)[inspections], (a)(6)[implementation], and (a)(7)[training.]

⁸ The fourth element was (a)(1)[designation of administrator]

or repeat violations within the prior three years. (§ 336(d)(3)) He rated good faith as poor (0%) because Stagliano lacked knowledge about IIPPs and lacked understanding of Cal/OSHA procedures. (§ 336(d)(2)) Hart determined that Employer's IIPP was non-operational. Where an employer does not have an operational IIPP, the only adjustment available for a serious violation is for size. (§ 336(d)(8)) This resulted in an adjusted penalty of \$14,400.

Hart then applied a 50% abatement credit. Application of the 50% abatement credit is not discretionary; it must be applied wherever it is not prohibited. (*Luis E. Avila dba E & L Avila Labor Contractors*, Cal/OSHA App. 00-4067, Decision After Reconsideration (Aug. 26, 2003).) The result was a proposed penalty of \$7,200.

The above calculations were computed consistently with the regulations, except for the rating for Extent. The rating for Extent depends on whether the violation pertains to a safety violation or a health—illness or disease—hazard. (§ 335(a)(2)) Here, the violation pertains to safety.

Section 335(a)(2)ii provides as follows:

When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

LOW—When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

MEDIUM—When occasional violation of the standard occurs of 15 – 50% of the units are in violation.

HIGH—When numerous violations of the standard occur, or more than 50% of the units are in violation.

Here, Employer's failure to ensure that employees comply with safe and healthy work practices affected all warehouse employees. This failure resulted in numerous violations as discussed above. Employer had 40 employees total. Of those, 22 worked in the warehouse. Under the above standard, Extent should be rated high.

Therefore, the penalty should be raised to \$9,000 to reflect a rating of high for Extent.

Conclusion

Therefore, Employer's appeal is denied. Citation 2 is affirmed, the penalty is raised to \$9,000, and is found reasonable.

Order

It is hereby ordered that Citation 1, Items 1 through 8, and Citation 3 are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

It is further ordered that Citation 2 is affirmed, the penalty is increased to \$9,000, and Employer's appeal denied. It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: March 11, 2015

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
ECHO ALPHA, INC., JOHN STAGLIANO, INC., EVIL ANGEL
PRODUCTIONS, JOHN STAGLIANO, INC. DBA EVIL ANGEL VIDEO**

Dockets 14-R4D1-0802 through 0804-

Date of Hearing: January 28, 2015

Division's Exhibits—Admitted

Exhibit Number	Exhibit Description
1	Jurisdictional Documents
2	Articles of Incorporation of John Stagliano, Inc.
3	Fictitious Business Name Statement
4	Certificate of Amendment to Articles of Incorporation
5	Illness and Injury Prevention Program
6	Employee Handbook-Revised April 2012
7	Bloodborne Pathogen Exposure Control Plan
8	Cal/OSHA Form C-10 Proposed Penalty Worksheet
9	Request for Documents

Employer's Exhibits—Admitted

Exhibit Letter	Exhibit Description
A	Hart notes of Christian Mann interview
B	Notice of Potential Serious Citations

Witnesses Testifying at Hearing

1. John Stagliano
2. Adam Grayson
3. Brandon D. Hart

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

March 11, 2015

DALE A. RAYMOND

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**ECHO ALPHA, INC.; JOHN STAGLIANO, INC., EVIL ANGEL PRODUCTIONS;
JOHN STAGLIANO, INC. DBA EVIL ANGEL VIDEO
Dockets 14-R3D1-0802 through 0804**

Abbreviation Key:	
Reg=Regulatory	W=Willful
G=General	R=Repeat
S=Serious	DOSH=Division
Er=Employer	

Inspection No. 317143170

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	REVOKED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R3D1-0802	1	1	461(a)	Reg	Er withdrew	X		\$350	\$350	\$350
		2	3241(a)	Reg	Er withdrew	X		350	350	350
		3	3320	Reg	DOSH withdrew—insufficient evidence		X	350	0	0
		4	2340.16(c)	G	Er withdrew	X		260	260	260
		5	2473.1(b)	G	Er withdrew	X		350	350	350
		6	2500.8(a)(4)	G	Er withdrew	X		390	390	390
		7	5193(c)(1)(A)	G	DOSH withdrew—insufficient evidence		X	7,200	0	0
		8	6151(c)(1)	G	Er withdrew	X		390	390	390
14-R3D1-0803	2		3203(a)	S	ALJ affirmed violation and increased penalty	X		7,200	9,000	9,000
14-R3D1-0804	3		5193(d)(1)	S	DOSH withdrew		X	7,200	0	0
Sub-Total								\$24,040	\$11,090	\$11,090

Total Amount Due*

\$11,090

NOTE: Please do not send payments to the Appeals Board. **All Penalty payments must be made to:**
Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

DR:ml
POS: 03/11/15

